IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

PETITION OF:	*	
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Food & Water Watch, et al.	*	
	*	
FOR JUDICIAL REVIEW OF THE DECISION OF THE:	*	
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State of Maryland, Department of the Environment 1800 Washington Boulevard Baltimore, Maryland 21230	*	**Civil Action No. C-02-CV-14-000786**
	*	
IN THE CASE OF:	*	
	*	
State of Maryland, Department of the Environment's Notice of Final Determination to Reissue General Discharge Permit for Animal Feeding Operations, National Pollutant Discharge Elimination System Permit No. MDG01, Maryland Permit No. 14AF	*	

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DEPARTMENT OF THE ENVIRONMENT'S ANSWER TO PETITIONERS' MEMORANDUM IN SUPPORT OF PETITION FOR JUDICIAL REVIEW

The State of Maryland, Department of the Environment (hereinafter, the "Department" or "MDE"), by and through its attorneys, Brian E. Frosh, Attorney General for the State of Maryland, and Stephanie Cobb Williams, Assistant Attorney General, pursuant to Maryland Rules 7-207(a), hereby files this Answer to Petitioners Food & Water Watch and Assateague Coastal Trust's (collectively, "Petitioners") Memorandum that was filed in support of their Petition for Judicial Review (hereinafter, "Pet. Mem."). For the reasons set forth below, Petitioners are not entitled to the relief sought because the Department's final determination to reissue the General Discharge Permit for Animal Feeding Operations, National Pollutant Discharge Elimination System (hereinafter, "NPDES") Permit #MGD01, Maryland Discharge

Permit # 14AF (hereinafter, the "GDP"), was proper and consistent with all applicable State and federal laws and regulations and Petitioners lack standing to seek judicial review.

STATUTORY AND REGULATORY AUTHORITY

Discharge Permits

Maryland law prohibits the discharge of pollutants to waters of the State unless the discharge is authorized by and is consistent with a discharge permit issued by MDE. Md. Code Ann., Envir. §§ 9-322, 9-323. Similarly, the federal Clean Water Act ("CWA") prohibits discharges of pollutants into waters of the United States unless the discharge authorized by and in accordance with the terms of an NPDES permit. 33 U.S.C. §§ 1311(a), 1342(a)(1). The NPDES permitting program requires that operators of point sources obtain an NPDES permit from EPA prior to the discharge of any pollutant. A "point source" is any "discernible, confined and discrete conveyance" but does not include agricultural storm water discharges and return flows from irrigated agriculture. 33 U.S.C. § 1362(14). EPA has the authority to delegate the NPDES program to state governments upon EPA approval of a state's proposal to administer its own program. 33 U.S.C. § 1342(b)(1)-(9); 40 C.F.R. Part 123. Once EPA delegates an NPDES program to a state, applicants must obtain NPDES permits from the relevant state agency. The Department is authorized to issue both State discharge permits and NPDES permits in Maryland. *Northwest Land Corp. v. Maryland Dept. of the Env't.*, 104 Md. App. 471, 478- 79 (1995); *see also* COMAR 26.08.04.07; *Howard County v. Davidsonville Area Civic and Potomac River Associations, Inc.*, 72 Md. App. 19, 24 n.3 (1987); Md. Code Ann., Envir. § 9-253 ("For purposes of the Federal Water Pollution Control Act, the Secretary is the State water pollution control agency in this State…The Secretary has all powers that are necessary to comply with and represent this State under the Federal Water Pollution Control Act…").

Some discharges are authorized by "individual discharge permits," that set forth requirements and pollutant limits tailored to a particular discharger such as a wastewater treatment plant or factory. The Department also issues "general discharge permits" for the purpose of regulating certain industries or categories or classes of discharge that are susceptible to regulation under common terms and conditions. 40 C.F.R. §§ 122.28; 123.25; COMAR 26.08.04.08- .09.[1] Specifically, general permits include conditions and other eligibility requirements that must be met in order to obtain permit coverage. *Id.* General permits may also provide for MDE review of specific applications for coverage or notices of intent ("NOIs") and retain agency discretion to impose additional site-specific requirements as needed. A.R. at pp. 9-12, ¶¶ III.A, C (in particular). Many general permits, such as the GDP, operate in conjunction with total maximum daily loads ("TMDLs")[2] established by MDE or EPA for all State waters that do not meet applicable WQS by prohibiting or minimizing discharges to enable water quality standards ("WQS") to be achieved. A.R. at pp. 26- 27, ¶ VII.K.

Total Maximum Daily Loads

Specifically, the GDP is part of a larger federal-State effort to identify the sources of pollution that impair Chesapeake Bay (the "Bay") water quality and reduce that pollution to bring the Bay back into compliance with water quality standards. Part of that effort involves the identification of TMDLs for all pollutants making their way into Maryland's waterways. Section 303(d) of the CWA directs states to identify those waters within its borders that are impaired by

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[1] The GDP is both a general State discharge and NPDES permit. *See* COMAR 26.08.04.08; 26.08.04.09N.

[2] A TMDL "is the sum of pollutants a body of water can absorb from all point and non-point sources, plus a margin of safety, and still meet water quality standards for its designated uses." Assateague Coastkeeper v. Maryland Dep't of the Env't., 200 Md. App. 665, 675 n. 8 (2011); 40 C.F.R. § 130.2.

one or more pollutants. 33 U.S.C. § 1313(d). States are further directed to establish a TMDL for each impairing pollutant that can be accommodated by the water body without violating water quality standards, and to allocate the available load to existing and future sources. A.R. at p. 415, ¶ 4.

With respect to point sources, these waste load allocations are ultimately imposed as effluent limitations in individual NPDES permits. By contrast, existing TMDLs do not include specific waste load allocations for individual concentrated animal feeding operations ("CAFOs") because the applicable technology does not allow for the development of allocations on a farm-by-farm basis. *Id.* Instead, TMDLs, such as the Bay TMDL, and Maryland's Watershed Implementation Plan ("WIP") include an aggregate pollutant load allocation from all agricultural sources. *Id.* EPA has approved all of Maryland's TMDLs on this basis. A.R. at 416, ¶ 4.[3]

Because of the interstate character of the Chesapeake Bay – it receives pollutant loads from the District of Columbia and six states within its watershed – EPA developed the TMDL for the Bay and its tidal tributaries and issued the final TMDL on December 29, 2010. 76 Fed. Reg. 549 (Jan. 5, 2011). Recognizing that the TMDLs for the Bay and other waters have been and continue to be developed, the GDP, like the 2009 GDP (Maryland Permit No. 09AF; NPDES Permit No. MGD01 ("GDP 09AF"), includes provisions that allow MDE the flexibility to impose "additional or alternative controls or monitoring" requirements in the event that subsequently issued TMDLs identify the need for pollutant load reductions beyond those

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[3] Maryland's nutrients and bacteria TMDLs include load allocations ("LA") for nonpoint sources and wasteload allocations ("WLA") for point sources. A.R. at p. 415, ¶ 4. The TMDL LA component includes allocations to agricultural land use, urban and forested areas, while the WLA contains allocations to traditional point sources (e.g. wastewater treatment plants) and NPDES-permitted storm water discharges. *Id.* Maryland's WIP reflects, among other things, the way the State intends to achieve the goals set forth in the Bay TMDL.

accomplished through the GDP. A.R. at pp. 26- 27, ¶ VII.K; 290, ¶ VII.K. Additional or alternative controls may be imposed through the GDP by way of MDE-approved NMPs or CNMPs, or they may be reflected as conditions in an MDE-required individual NPDES permit. A.R. at pp. 10, ¶ III.A.5; 20, ¶ IV.G.; 27, ¶ VII.M.2.

FACTUAL AND PROCEDURAL HISTORY

Federal Regulation of CAFOs

Included within the definition of point sources are CAFOs, which are specifically defined as farms, lots, or other facilities where animals are stabled or confined for a total of at least 45 days in a 12-month period, and in numbers that meet applicable size thresholds. *See* 33 U.S.C. § 1362(14); 40 C.F.R. § 122.23(b). For example, a dairy farm would qualify as a "Large CAFO" if it maintains 700 or more mature dairy cows. 40 C.F.R. § 122.23(b)(4)(i). While discharges from CAFOs are regulated as point sources, "agricultural storm water runoff" is explicitly excluded and, as such, there is no obligation under federal law to obtain an NPDES permit for such runoff. *See* 33 U.S.C. § 1362(14). In addition, the CWA regulates discharges to surface waters, but not ground water, which does not qualify as "waters of the United States." *See Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001). Maryland is more stringent and regulates through the GDP discharges to both surface and ground waters.

While EPA began regulating surface water discharges of wastewater and manure from CAFOs in the 1970s, it promulgated new regulations in 2003 that expanded the definition of CAFO to encompass a wider variety of poultry operations. *See* 39 Fed. Reg. 5704 (February 14, 1974); 73 Fed. Reg. 7176 (February 12, 2003). In addition, the 2003 regulations required *all* CAFOs to obtain an NDPES permit unless they could demonstrate that their operations involved "no potential to discharge." *See* 68 Fed. Reg. 7176–7274 (Feb. 12, 2003); *see also* 73 Fed. Reg.

70418, 70419-22 (Nov. 20, 2008) (recounting history of EPA regulation of CAFOs). After environmental and industry groups challenged the rule, the U.S. Court of Appeals for the Second Circuit vacated the portion of the rule that required permits for CAFOs on the basis of their "potential to discharge," instead of their "actual[] discharge" of pollutants. *Waterkeeper Alliance, et al. v. EPA*, 399 F.3d 486, 505, 524 (2nd Cir. 2005). The court also ruled that EPA could not issue permit coverage without subjecting applicants' nutrient management plans ("NMPs") to public comment and without EPA itself reviewing and approving those plans. *Id.* at 524.

In response to the *Waterkeeper* decision, EPA revised the NPDES permitting requirements in 2008 so as to require CAFOs to seek coverage under an NPDES permit only if they "discharge or propose to discharge," and to require each CAFO that does apply to submit an NMP with its application. *See generally* 73 Fed. Reg. 70418 (Nov. 20, 2008) ("2008 Federal Rule"). State permitting authorities are required to review the NMPs, provide the public with an opportunity for meaningful review and comment, and incorporate terms of the NMP as enforceable elements of the NPDES permit. *Id.* The rule also modified the performance standards applicable to new CAFOs so as to allow for "no discharge" from "production areas," which are defined to include "the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas." 40 C.F.R. § 412.2. The 2008 Federal Rule remains in effect with the exception of the permit requirement for owners or operators of a CAFO that propose to discharge. 77 FR 44494 (July 30, 2012).[4]

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[4] The "propose to discharge" portion of the 2008 Federal Rule was vacated by the U.S. Court of Appeals for the Fifth Circuit in 2012. As such, EPA only regulates CAFOs that discharge. See National Pork Producers Council v. EPA, 635 F. 3d 738, 756 (5th Cir. 2011). As discussed herein, Maryland regulates both actual and potential discharges from point sources such as CAFOs.

State Regulation of AFOs

Maryland law addresses potential discharges from agricultural operations in two ways. First, the Maryland Department of Agriculture ("MDA") administers the Water Quality Improvement Act of 1998, which requires virtually all commercial farming operations in the State to develop and implement nutrient management plans. *See* Md. Code Ann., Agric. §§ 8-801–8-807. Second, MDE regulates certain agricultural discharges to waters of the State through its discharge permit program. *See* Md. Code Ann., Envir. § 9-323.

Like EPA, MDE has adopted regulations that govern the issuance of general discharge permits that specifically identify discharges from AFOs as appropriate for general permit coverage. *See* COMAR 26.08.04.08, 26.08.04.09N. Maryland initially regulated CAFOs through regulations and a previous general permit, both of which were adopted in 1996. Under the 1996 permit, discharges were authorized from animal waste systems to groundwater, including field application of wastewater. To be covered under the 1996 permit, a person needed only to submit an application – called a "notice of intent" or "NOI" – pay the required fee, and comply with the terms and conditions of the permit. As with EPA's pre-2003 regulations, the vast majority of poultry operations in Maryland did not qualify as CAFOs under the 1996 regulations. Due to the limited scope of the 1996 regulations, only seven CAFOs obtained permit coverage under the general permit during the five-year term of the permit, and three other facilities obtained individual permits after the 1996 GP expired. The vast majority of these facilities were dairy operations

In 2004, the Department proposed to revise its CAFO regulations and issue a new permit consistent with EPA's 2003 CAFO rule. When the *Waterkeeper* decision came out in 2005 and EPA indicated that it was going to revise its regulations, MDE initially decided to wait for the

final federal regulations before proceeding with its own rulemaking. However, when the federal regulations had not been finalized by 2007, the Department resumed its own regulatory process and, in conjunction with MDA, proposed a new AFO permit and regulations.

As did EPA's 2003 CAFO rule, the new permit and regulations proposed to extend regulation to poultry farms and other AFOs that were previously not regulated. In addition, the Department wanted to regulate, pursuant to its own *State* law authority, poultry operations that do not "discharge or propose to discharge" to surface waters but that nevertheless pose a threat to ground water, which is regulated by the State but not EPA. Accordingly, MDE proposed to create within the GDP a category of AFOs that is subject to State permit requirements even if the operator did not discharge or propose to discharge to surface waters. The Department identified these newly defined and previously unregulated facilities as "Maryland animal feeding operations" or "MAFOs." *See* COMAR 26.08.01.01(42-1) (defining "MAFO").

Under Maryland's regulatory program, an owner or operator of a CAFO (regardless of the size) seeking GDP coverage must submit to MDE an NOI and either a comprehensive nutrient management plan ("CNMP") or an NMP and conservation plan ("CP"). A.R. at pp. 9-10. Moreover, Maryland requires all CAFOs to comply with applicable federal effluent limitation guidelines and standards ("ELGs").[5] A.R. at p. 5, 44- 45; 40 C.F.R. Part 412 (applicable to manure, litter, and/or process wastewater discharges resulting from CAFOs); *see also* 40 C.F.R. §§ 412.31- .33; 412.35, .37. Every MAFO is required to obtain GDP coverage and submit to the Department both an NMP and conservation plan ("CP"). A.R. at pp. 3, 12.

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[5] Effluent guidelines and standards or "ELGs" are national regulations that establish numeric or non-numeric limitations on the discharge of pollutants by industrial category and subcategory. A.R. at p. 460. Non-numeric ELGs, such as 40 C.F.R., Part 412 which is incorporated into the GDP, are generally in the form of best management practice ("BMPs") and are based on the degree of control that can be achieved using various levels of pollution control technology. *Id.*

MAFOs are prohibited from discharging to surface waters by the State; groundwater discharges are only authorized if the discharge results from operations in compliance with the GDP. A.R. at pp. 5, 12- 18. Additionally, MAFO production areas must comply with federal effluent limitation guidelines. *See* 40 C.F.R. §§ 412.37(a), (b). By operation of law, a MAFO that discharges or proposes to discharge pollutants to surface waters of the State becomes a CAFO and must comply with all permit requirements for CAFOs. A.R. at p. 4. Portions of a CAFO or MAFO that are within the production area, but not specifically defined in the term "production area" (e.g. areas between poultry houses) are subject to best professional judgment ("BPJ"). A.R. at p. 45.

Appeal of Maryland's 2009 Permit

In 2009, the Department issued General Discharge Permit for Animal Feeding Operations, Maryland Permit No. 09AF; NPDES Permit No. MGD01 ("GDP 09AF"). A.R. at 268- 295. Several environmental groups unsuccessfully appealed various provisions of GDP 09AF pursuant to the then applicable Administrative Procedure Act. *Assateague Coastkeeper*, 200 Md. App. 665 (2011). The GDP contains provisions identical to GDP 09AF with the exception of typographical error corrections and some minor clarifications and revisions to the permit language. A.R. at 1; 15-16; 41- 43; 76- 77. Relevant to this action, is the Department's revision of the language set forth in IV.A.6.b.4(ii) and IV.A.7.a.5(ii).[6] *Id.* The remainder of the provisions contained in GDP 09AF remain identical in the GDP, including V.A., the permit provision Petitioners seek to challenge. Pet. Mem. at pp. 27- 33; A.R. at 15- 16; 285. Among the GDP 09AF provisions that the Court of Special Appeals found to be consistent with

[6] Petitioners raised two specific legal issues with respect to Parts IV.A. (operation of animal waste storage and distribution systems) and V.A. (monitoring) of the Permit. Pet. Mem. at pp. 18- 33. The parties requested that this Court remand Parts IV.A.6.b.4(ii) and IV.A.7.a.5(ii) to MDE for certain revisions, as such, this Opposition only addresses Petitioners' arguments regarding Part V.A. (monitoring) of the GDP.

applicable State and federal law are MDE's regulation of some federally defined CAFOs as MAFOs[7] and field storage of poultry litter. The Court also ruled that GDP 09AF was consistent with the CWA because discharges would not cause or contribute to "water quality standard" or WQS violations; and that the GDP 09AF was broader than federal law because it regulated CAFOs that discharged or proposed to discharge, and MAFOs which do not discharge or propose to discharge.[8]

Petitioners' Appeal of Maryland's 2014 Permit

On June 17, 2014, the Department submitted a draft renewal GDP to EPA for its review under 40 C.F.R. § 123.44, which gives EPA the opportunity to make objections to state-issued general permits to "ensure compliance" with the "CWA or any guidelines or regulations," and that the state-issued permit will "[a]chieve water quality standards." 40 C.F.R. § 123.44(c)(1), (4), (8) (incorporating requirements of 40 C.F.R. § 122.44(d)). A.R. at pp. 238- 39. MDE and EPA corresponded with one another regarding various provisions and requirements in the draft permit. A.R. at pp. 225- 37. On September 18, 2014, EPA completed its review of the draft renewal GDP and informed MDE that it "had no objection to the issuance of the draft permit as written." A.R. at pp. 223- 24. The Department published a tentative determination to renew the GDP with certain modifications, along with the draft GDP. A.R. at pp. 183- 222 (tentative determination 183- 84; fact sheet 185- 194; draft GDP 194- 222). During the public comment period, MDE received numerous written comments; the agency also received oral comments at

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[7] In fact, the Court of Special Appeals determined that Maryland's program was more broad than EPA's because the State prohibits discharges to both surface and ground waters, while the CWA's jurisdiction only applies to surface water discharges. *Assateague Coastkeeper* at pp. 723- 24.

[8] "Discharge" is defined as including both actual discharges and placing of a pollutant in a location where the pollutant is likely to discharge. Md. Code Ann., Envir. § 9-101(b)(2); COMAR 26.08.01.01B(20).

the October 12, 2014 public hearing. A.R. at pp. 90- 162 (written comments); 163- 182 (public hearing transcript- oral comments). The Department made revisions to the draft GDP based on public comments received and reissued the GDP effective December 1, 2014. A.R. at pp. 1- 49 (final determination 1- 2); (GDP 3- 39); (fact sheet 40- 49). Petitioners timely filed this judicial review action.

QUESTIONS PRESENTED FOR REVIEW

1. Do Petitioners have legal standing under § 1-601 of the Environment Article to bring this judicial review action?

2. Is Department's final determination to reissue the Permit consistent with applicable State and federal law, and substantially supported by evidence in the record?

STANDARD OF REVIEW

The court's role in reviewing an administrative agency decision is narrow in scope and highly deferential. *Board of Phys. Quality Assur. v. Banks*, 354 Md. 59, 67, 729 A.2d 376 (1999); *Md. Dep't of the Env't. v. Anacostia Riverkeeper*, 222 Md. App. 153 (2015). Specifically, the Court's review is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is legally correct. *Id.* (*citing Najafi v. Motor Vehicle Admin.*, 418 Md. 164, 173-74 (2011)). When applying the substantial evidence test, the reviewing court must determine "whether a reasoning mind reasonably could have reached the factual conclusion the agency reached." *Id.* (*quoting Md. Aviation Admin. v. Noland*, 386 Md. 556, 571- 72 (2005)). Moreover, the reviewing court "is obligated to view the 'agency's decision in the light most favorable to the agency since its decisions are prima facie correct and carry with them the presumption of validity." *Bereano v. State Ethics Comm'n.*, 403 Md. 716, 732 (2008) (*citing*

Anderson v. Dept. of Safety & Corr. Servs., 330 Md. 187, 213 (1993) and *Bullock v. Pelham Woods Apts.*, 283 Md. 505, 515 (1978)).

In its analysis, the court should both respect the expertise of the agency in its own field and not substitute its judgment for the expertise of those persons who constitute the administrative agency. *Anacostia Riverkeeper*, 222 Md. App. at 170 (*quoting Board of Phys. Quality Assur.*, 354 Md. at 69); *Assateague Coastkeeper v. Md. Dep't. of the Env't.*, 200 Md. App. 665, 690 (2010). An agency's authority "may include a broad power to promulgate legislative-type rules or regulations" to assist in implementing applicable statutes. *Id.* "[T]he powers vested in the courts, by statute or inherence, to review administrative decisions does not carry with it the right to substitute its fact-finding process for that of an agency. *Id.* (*quoting Northwest Land Corp. v. Md. Dep't of the Env't*, 104 Md. App. 471, 488 (1995)). While the court generally conducts a de novo review of an agency's legal conclusions, "[e]ven with regard to some legal issues, a degree of deference should often be accorded the position of the administrative agency." *Assateague Coastkeeper*, 200 Md. App. at 690 (*citing* Najafi, 418 Md. at 172- 73 (*quoting Noland*, 386 Md. 556, 571- 72)).

Judicial review of MDE's permit decision is also governed by Title 1, Subtitle 6 of the Environment Article. Md. Code Ann., Envir. §§ 1-601- 1-606. Accordingly, this Court's review is limited to whether the Petitioner has demonstrated that the Department acted in an arbitrary and capricious manner or erred as a matter of law as discussed above. Moreover, the Court's review of MDE's permit decision shall be on the administrative record before the agency, and limited to both the record compiled the Department and objections raised during the public comment period, unless the petitioner can demonstrate that: (i) [t]he objections were not reasonably ascertainable during the comment period; or (ii) [g]rounds for the objections arose

after the comment period. Md. Code Ann., Envir. §§ 1-601(d), 1-606(c). A petition for judicial review under Title 1, Subtitle 6 of the Environment Article must both comply with and be conducted in accordance with the Maryland Rules. Md. Code Ann., Envir. § 1-605(a), (c).

ARGUMENT

I. PETITIONERS HAVE NOT DEMONSTRATED THAT THEY HAVE STANDING TO SEEK JUDICIAL REVIEW OF MDE'S PERMIT DECISION

Section 1-601(c) of the Environment Article allows any person that meets the threshold standing requirements under federal law and is the applicant or participated in the public participation process to seek judicial review of the GDP. To satisfy federal standing requirements in an environmental action, a plaintiff only needs to show that "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely as opposed to merely speculative that the injury will be redressed by a favorable decision." *Patuxent Riverkeeper v. Md. Dep't of the Env't.*, 422 Md. 294, 299-300 (2011) (*citing Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000) (*quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)). An environmental group can satisfy federal standing requirements if sufficient facts are set forth to show that "its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.*

Although the Petitioners engaged in the public participation process through the submission of written comments, they have not set forth any facts in either their Petition or Memorandum demonstrating that they, or any of their individual members, meet federal standing requirements. Petition at pp. 1- 2; Pet. Mem. at pp. 15- 16; R. at 100. During the 2009

legislative session, amendments were made to Title 1, Subtitle 6 of the Environment Article, among other statutory provisions not relevant here, that altered the way in which third parties appeal certain MDE permit decisions. *See* 2009 Md. Laws Chs. 650, 651; *see also* Md. Code Ann., Envir. §§ 1-601, 1-605(a)-(c) (2013 Repl. Vol.). Prior to the 2009 amendments, a third-party petitioner could establish standing to challenge certain MDE permits only when "aggrieved" by the agency's decision. *See, e.g. Bryniarski v. Montgomery County Bd. of Appeals*, 247 Md. 137, 146- 47 (1967); *Sugarloaf v. Dep't of the Env't*, 344 Md. 271, 295 (1006); *120 W. Fayette St., L.L.L.P. v. Mayor of Baltimore*, 407 Md. 253, 271- 72 (2009). Traditional Maryland standing principles also limited the ability of environmental groups like Food & Water Watch, Inc., and Assateague Coastal Trust to challenge environmental permitting decisions. In order to establish standing, such groups were required to demonstrate that they possessed a property interest of their own that would be adversely affected by the project; they could not establish representational organizational standing on the basis of the interests of one or more of their members. *See e.g. Citizens Planning & Housing Ass'n v. County Executive*, 273 Md. 333, 345 (1974); *Medical Waste Ass'n v. Maryland Waste Coalition*, 327 Md. 596, 613- 14 (1992).

The 2009 amendments altered this process in two ways. First, they eliminated contested case hearings in favor of direct, on-the-record judicial review of certain MDE permitting decisions. Second, the 2009 amendments facilitated the ability of individuals and organizations to challenge the issuance of certain MDE permits by adopting the less rigorous test for standing developed under federal case law. *See* 2009 Md. Laws Ch. 650, 651. Thus, any person seeking judicial review must meet the threshold standing requirements of federal law; and either be the

applicant or, like Petitioners, have engaged in the public participation process. Md. Code Ann., Envir. § 1-601 (emphasis added).

Since Petitioners have not articulated any facts in the Petition or their Memorandum sufficient to meet their burden of establishing that they meet threshold federal standing requirements, the Department moves this Court to dismiss their petition. .[9]

II. THE PERMIT'S MONITORING REQUIREMENTS ARE CONSISTENT WITH APPLICABLE STATE AND FEDERAL LAW

Petitioners contend that the GDP is less stringent than federal law because MDE did not include provisions in the GDP requiring owners and operators of CAFOs to perform effluent monitoring pursuant to 40 C.F.R. § 122.44(i)(1); and as a result, the GDP is inconsistent with the Bay TMDL and Maryland's WIP. Pet. Mem. at pp. 27- 33. Although the CWA requires that state programs be no less stringent than corresponding federal requirements, the type of monitoring program Petitioners suggest is not applicable to the GDP, and even without the suggested 40 C.F.R. § 122.44(i)(1) monitoring program, the GDP is at more stringent than federal CAFO permits. *See* 33 U.S.C. § 1370; Md. Code Ann., Envir. §§ 9-314(c); 9-324(a); 9-326(a).

A. The monitoring program Petitioners cite is not legally required.

Generally, the CAFO point source category is not subject to water quality based effluent limitations ("WQBELs"). *See* 40 C.F.R., Part 412 (setting technology-based effluent limitations); A.R. at pp. 5- 6; 12- 21, ¶¶ IV. and V.A. If, however, MDE determines that WQBELs are necessary to protect water quality, the agency has the authority to impose such limits in the GDP, and any such limits imposed must meet applicable requirements in 40 C.F.R.

[9] The Department reserves the right to address the specifics of each element Petitioners must establish and the facts sufficient to meet federal standing requirements both at oral argument and in any subsequent appeals.

§ 122.44. 40 C.F.R. § 122.28(a)(3). Petitioners maintain that Part V.A. of the GDP must set forth a traditional NDPES monitoring program- sampling effluent at a particular location such as an outfall at a wastewater treatment plant, the samples are analyzed for particular pollutants or constituents, and the results are recorded on a discharge monitoring report. The problem with Petitioners' argument is that CAFOs, unlike wastewater treatment plants and factories (the discharges NPDES permit requirements were originally drafted to address, not stormwater), generally do not have pipes or discharge points where effluent, if there were any, can be sampled. This makes traditional sampling infeasible in some instances and potentially ineffective for this category of dischargers. In fact, EPA considered and rejected requiring jurisdictional CAFOs to sample surface waters adjacent to "feedlots" or CAFOs, or land under control of the "feedlot" or CAFO to which manure is applied. 68 Fed. Reg. 7217, 7219 (February 12, 2003) ("2003 Rule"). Such sampling would have required CAFOs to sample both upstream and downstream from the "feedlot" or CAFO and land application areas following significant rain events. *Id.*

In the rationale for rejecting the imposition of CAFO monitoring requirements through the ELG (40 C.F.R., Part 412), EPA discussed concerns regarding "the difficulty of designing and implementing through a national rule an effective surface water monitoring program that would be capable of detecting, isolating, and quantifying the pollutant contributions reaching surface waters from individual CAFOs; and because the addition of instream monitoring does

not by itself achieve any better controls on the discharges from CAFOs than the controls imposed by this rule."[10] Petitioners suggest that MDE is legally required to include such monitoring in the GDP, but EPA has not mandated that CAFOs perform upstream, downstream, in-stream or any other such monitoring under the ELG; rather EPA has given state permitting authorities the discretion with regard to when, if at all, CAFOs should implement traditional monitoring programs such as that suggested by Petitioners. While the traditional monitoring program set forth in 40 C.F.R. §§ 122.44(i)(1) is generally not applicable to the CAFO point source category for the reasons cited by EPA in its rejection of such monitoring, MDE, as an exercise of discretion, has determined that such monitoring is not necessary under the GDP.

Moreover, 40 C.F.R. §§ 122.44 (establishing limitations, standards, and other permit conditions) clearly states "[i]n addition to the conditions established under § 122.43(a), each NPDES permit shall include conditions meeting the following requirements when applicable…" (emphasis added); clearly EPA contemplated NPDES permits, such as the GDP, where some or all of the conditions listed in the regulation would not be applicable. Although the CAFO ELG is technology-based, a waiver under § 122.44(a)(2) is not necessary because the ELGs and other legal requirements express the manner in which CAFOs will accomplish the zero discharge effluent limitation- the control of manure, litter, and process wastewater, and other pollutants through site specific NMPs and additional BMPs (including visual inspections of manure storage areas). 40 C.F.R. Parts 122 and 144; A.R. at pp. 3-5; 9, 11; 12- 22; 24- 25. Additionally, the only numeric effluent limitations set forth in the ELG are for large duck CAFOs which are not

[10] Although EPA explicitly rejected the inclusion of upstream, downstream, and in-stream monitoring requirements for CAFOs in the 2003 Rule, EPA did indicate that the permitting authority- which in Maryland is MDE- retains the authority to include in-stream monitoring in NPDES permits as either technology-based requirements based on BPJ or water quality-based requirements, where the permitting authority determines such requirements are necessary. 68 Fed. Reg. 7217, 7219 (February 12, 2003).

eligible for coverage under the GDP. 40 CFR 412, Subpart B; COMAR 26.08.04.09N(1)(b); A.R. at p. 43 (excluding large duck CAFOs from GDP coverage and individual discharge permit requirement). Clearly, EPA intended to only require the sampling envisioned by Petitioners at large duck CAFOs and not the other animal categories set forth in the ELG.

B. The GDP is consistent with EPA's Chesapeake Bay TMDL and Maryland's WIP.

EPA, in developing the Chesapeake Bay TMDL or "Bay TMDL", did not identify particular CAFOs, rather EPA included an allocation for the agricultural sector taking into account their finding that there was little to no difference in discharge quality from CAFOs whether permitted or unpermitted where the same BMPs were installed. *See* Chesapeake Bay TMDL at pp. 5-36- 5-37 (http://www.epa.gov/reg3wapd/tmdl/ChesapeakeBay/tmdlexec.html). Also, the CWA itself does not mandate a complete ban on discharges into a waterway, such as the Chesapeake Bay and its tributaries, that is in violation of water quality standards. *Arkansas v. Oklahoma*, 503 U.S. 91, 197 (1992). CAFO production areas[11], which are the sole focus of both the federal and State regulatory programs, are a tiny portion of the Chesapeake Bay watershed. Since it is not possible to isolate CAFO production areas in the Bay TMDL, EPA assigned WLAs with certain assumptions- that there will be some pollutants discharged from CAFO production areas despite the zero discharge ELG for large CAFOs (and in Maryland medium and smalls as well) and set certain requirements, such as BMPs, which are set forth in the GDP. Thus any incidental discharges from CAFO production areas where the operator has properly installed and maintained the required BMPs would be consistent with the Bay TMDL. In addition, Maryland's Phase II WIP revised the Phase I WIP with regard to agricultural watersheds, among other revisions not relevant here, and set forth how Maryland plans to

[11] The CAFO production area includes the animal confinement areas and other parts of the operation, including manure and raw materials storage areas, and waste containment areas. *See* A.R. at p. 8, ¶¶ II.AA; 40 C.F.R. § 122.23(b)(8).

implement the requirements of the Bay TMDL. EPA accepted the revisions made by MDE as consistent with the Bay TMDL and the animal sector WLA, and the Phase II WIP in its entirety.

C. The GDP is sufficiently protective of water quality.

Maryland's, like EPA's, regulatory scheme for CAFOs is sufficiently protective of Maryland water quality. Specifically, under the GDP Maryland CAFOs (regardless of size) are subject to the zero discharge effluent limitation set forth in 40 C.F.R., Part 412; both CAFOs and MAFOs are required to submit an NMP with the NOI; CAFOs and MAFOs must implement NMPs (CAFOs- an NMP or CNMP; MAFOs- an NMP and CP) which include at a minimum the BMPs set forth in 40 C.F.R. § 122.42(e), and all requirements of COMAR 15.20.07 and 08.; there are additional MAFO-specific requirements; and both CAFOs and MAFOs are subject to certain record keeping and reporting requirements. A.R. at pp. 8 (¶ III.A.2); 12- 24 (¶¶ IV. and V.). Moreover, the GDP, like all other discharge permits issued under EPA's NPDES program, relies upon a permittee self-monitoring regulatory framework. Thus, CAFOs covered under the GDP are required to report to MDE any discharge of pollutants, and the Department has both enforcement discretion and the ability to require corrective action to ensure against any such discharges. A.R. at pp. 23 (¶ V.F.), 24 (¶ VI.); Md. Code Ann., Envir. §§ 9-334- 9-344.

i. Zero Discharge Effluent Limitation

First, both large CAFO production and land application areas are subject to the effluent limitations set forth in 40 C.F.R. 412 (CAFO Point Source Category). The effluent limitations contained in the GDP, like other NPDES permits, are the primary mechanism for controlling discharges of pollutants to surface waters. The GDP sets forth the limitations applicable to both Maryland CAFOs and MAFOs in narrative, rather than numeric form. A.R. at pp. 5- 6; 12- 18, ¶¶ IV.A. and B. (no discharge of pollutants to surface waters of the State from CAFO

production areas shall be permitted unless the discharge results from a 25-year/24-hour storm event and the production area is designed, operated and maintained in accordance with an MDE-approved CNMP or NMP and CP that meets certain standards); *see also* 40 C.F.R. § 412.31(a), (b) (applicable to both Subpart C- Dairy Cows and Cattle other than Veal Calves and Subpart D- Swine, Poultry and Veal Calves); § 40 C.F.R. 412.43; COMAR 26.08.03.09C (5), (6) (MAFO effluent limitations- State discharge authorization only).

Moreover, CAFOs must properly design, operate and maintain storage structures to contain all manure, litter, and process wastewater including the runoff from a 25-year, 24-hour rainfall event. 68 Fed. Reg. 7218 (February 12, 2003). EPA has indicated that the 2003 Rule production area requirements established for large swine, poultry and veal CAFOs will provide effective control of discharges of manure and other process wastewaters to surface waters consistent with the statutory factors EPA is required to consider under the CWA in establishing effluent guidelines for existing sources (BPT, BCT, and BAT). *Id.* EPA has further stated that the large CAFO production area requirements "are widely demonstrated as technologically achievable for these operations" and that effluent limitations in the form of BMPs are particularly suited to the regulation of CAFOs" since controlling discharges to surface waters is largely associated with controlling runoff and controlling overflows from manure storage structures for many CAFOs. *Id.*

ii. Required Plans and BMPs

Under both State and federal law, CAFO owners and operators seeking general discharge permit coverage are required to submit an NOI in accordance with 40 C.F.R. § 122.28(b); COMAR 26.08.04.09N. The Department must review all NOIs that are submitted to ensure that the NOI includes the information required by 40 C.F.R. §§ 122.21(i)(1) (application

requirements for new and existing CAFOs); and must also include a nutrient management plan ("NMP") that meets the requirements of 40 C.F.R. § 122.42(e) (additional conditions applicable to CAFO NPDES permits) and applicable effluent limitations and standards, including 40 C.F.R., Part 412.[12] *See also* A.R. at p. 10, ¶ III.A.2. In Maryland, NMPs are site-specific and prepared by certified nutrient management planners, and must meet MDA, MDE and federal requirements, including certain National Resource Conservation Service ("NRCS") standards and specifications. COMAR 26.08.01.01B(53-1); 40 C.F.R. § 122.42(e)(1)- (6). The NMP and CP together must ensure that appropriate manure management measures are used to store, stockpile, and handle animal manure and waste nutrients associated with animal production to minimize the potential for nutrient loss or runoff. A.R. at p. 13, ¶ IV.A.1.a. Both CAFOs and MAFOs' CPs must be based upon an assessment of possible resource concerns and include scheduled practices that must be implemented based on applicable NRCS conservation standards in effect at the time of GDP issuance and any additional applicable MDE-approved Maryland interim or national NRCS conservation standards. *Id.* at ¶ IV.A.1.b.

The GDP also sets forth the minimum resource concerns that CAFOs and MAFOs must address in the CP and requires that each listed resource concern meet applicable NRCS Practice Standards. *Id.* CNMPs (NMP and CP combined) are developed in accordance with NRCS planning policy and meet certain technical standards. COMAR 26.08.01.01B(13-1); A.R. at p. 13, ¶ IV.A.1.c. The GDP, consistent with federal regulation, sets forth nine minimum water quality standards that must be contained in every required plan and implemented by every CAFO owner and operator, in addition to all other BMPs and GDP terms and conditions. A.R. at pp. 16- 18, ¶ IV.B.; 40 C.F.R. § 122.42(e)(1)- (6). The terms of NMPs and other required plans are

[12] In Maryland, CAFO and MAFO owners and operators can choose the type of required plan they would like to submit with the NOI- a CNMP or an NMP and CP. The federal regulations require CAFOs to submit NMPs. A.R. at p. 12, ¶ IV.A.1.

incorporated into the GDP as NPDES permit conditions that can be enforced by the Department. A.R. at p. 6, ¶ I.B.5. MDE also retains that authority to require additional BMPs if deemed necessary. A.R. at p. 10, ¶ III.A.5.

iii. Additional CAFO Production and Land Application Area Requirements

Maryland CAFO owners and operators, in addition to the practices and standards set forth in their required plans and the GDP BMPs, *see* A.R. at pp. 12- 22, ¶¶ IV. and V.A.- .C (operation of animal waste storage and distribution systems and monitoring, record keeping and annual report), are also able to meet the stringent GDP zero pollutant discharge effluent limitation through the implementation of additional production and land application area requirements consisting of visual inspections and the creation and maintenance of certain records.[13] A.R. at pp. 14- 16, ¶¶ IV.A.2.- .7; 21, ¶ V.C.; *see also* 40 CFR §§ 412.37(a), (b), 412.47(a), (b); 122.42(e). Specifically, CAFOs owners and operators must perform routine visual inspections of the production area, use depth markers for liquid manure impoundments, take immediate corrective action upon the discovery of deficiencies, and apply certain mortality handling practices. *Id.* CAFO owner and operators must keep and maintain onsite records documenting the production area visual inspections, and other measures previously set forth, as well as records documenting the design of animal waste storage structures, and overflows from these structures. *Id.* The State and federal AFO regulatory schemes, combined with the required plans, nine minimum standards to protect water quality, and BMPs that Maryland CAFOs and MAFOs are required to install and maintain are designed to enable CAFO owners and operators to meet the zero pollutant discharge effluent limitation in the GDP and federal ELG without the need for traditional end-of-pipe monitoring, and as such, are sufficiently protective of water quality and

[13] CAFO land application areas include all land under the control of the CAFO or operator, including land owned, rented or leased by a CAFO to which manure, litter or process wastewater from the production area is or may be applied. *See* 40 C.F.R. § 122.23(b)(3).

are consistent with the Bay TMDL and Maryland's WIP. Moreover, the federal regulatory scheme clearly authorizes monitoring at CAFOs through BMPs, and Maryland retains the right to require effluent sampling if deemed necessary. Therefore, the GDP is consistent with both State and federal law, and the Department's record contains sufficient evidence of such.

CONCLUSION

Based upon the foregoing, the Department's final determination to issue the GDP is consistent with all applicable State and federal laws and regulations, and is substantially supported by the Department's record. Accordingly, MDE's determination should be affirmed, and Petitioners' requested relief denied, alternatively, this matter should be dismissed because Petitioners lack standing to seek judicial review of the Department's permit decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June 2015, copies of the State of Maryland, Department of the Environment's Opposition to Petitioners' Memorandum in Support of Petition for Judicial Review were served electronically and by first-class mail, postage prepaid on: Susan Kraham, Esq. (skraha@law.columbia.edu), and Edward Lloyd, Esq. (elloyd@law.columbia.edu), Columbia Environmental Law Clinic, 435 West 116th Street, New York, New York 10027; and Russell B. Stevenson, Jr., Esq. (rstevenson@pobox.com), 733 Dividing Road, Severna Park, Maryland 21146, attorneys for Petitioners.

_____/s/_____
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